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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FREDERICK LEE JOHNSON, Defendant and Appellant.	B167215 (Los Angeles County Super. Ct. No. TA058872)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed.

Frank Duncan for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter, Joseph P. Lee and Kenneth N. Sokoler, Deputy Attorneys General, for Plaintiff and Respondent.

Frederick Lee Johnson appeals from the judgment entered upon his conviction by jury of shooting at an inhabited dwelling, with the personal use of a firearm, and possession of a firearm by a convicted felon (Pen. Code, §§ 246, 12022.5, subd. (a)(1), 12021, subd. (a)(1)), with findings that he had four prior felony convictions within the meaning of the three strikes law (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and a prior felony conviction within the meaning of Penal Code sections 667, subdivision (a) and 667.5, subdivision (b). He was sentenced to 55 years to life in prison.[1]

Appellant contends (1) that the trial court failed to instruct the jury on accomplice testimony; (2) that the trial court erred in instructing the jury in accordance with CALJIC No. 2.27; (3) that trial counsel rendered ineffective assistance with respect to the instructions; (4) that the evidence was insufficient to support his convictions; and (5) that the trial court erroneously admitted hearsay evidence, violating his Sixth Amendment right to confront witnesses. We affirm.

FACTS

We view the evidence in accordance with the usual rules on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) In October 2000, appellant, who was then in Texas, was informed that his teenage son, Fred, a member of the "Two Lefts" gang, had been shot and killed in the front yard of appellant's house in Lynwood. Appellant flew back to California with his then girlfriend, Tami Clark. Appellant told Clark that he wanted to find out who killed his son because the killing of his son was a matter of "disrespect" to him, since he was an "O.G." in his area. He stated, "'You don't do that. You don't [do] that to me. And if somebody does that, they're dying.'"[2]

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[1] Appellant was also charged with attempted murder. The jury was unable to reach a verdict on this charge, and a mistrial was declared. This was appellant's second trial on these charges. The first trial resulted in a mistrial after the jury announced that it was deadlocked on all counts.

[2] Clark testified at trial that she had never mentioned this statement before.

One of Fred's fellow gang members told appellant that Fred had been killed in a shootout with K-9, a member of a rival gang, the In Hood Crips, during which both Fred and K-9 fired guns and Fred was hit, and that K-9's gun was bigger than Fred's. Many people came to appellant's Lynwood house to offer condolences. During this period, appellant's house was fired upon. Some of the young people would come to appellant's house and tell appellant that they had looked for K-9 or had shot at houses or individuals, as if seeking appellant's approval. Appellant would reply, "'I don't want to hear about it. You know what you got to do. Take care of your business. I don't want to hear about it.'"[3]

Appellant and Clark went back to Texas but returned to California in November 2000, the following month, driving a Chevy Lumina. On November 16, 2002, they took a brief trip to Mexico, and on their return on November 17, their vehicle was detained at the border and searched by a United States Customs Service inspector. The inspector testified that a Glock model 21 .45-caliber handgun was found in the vehicle, and a magazine for a weapon was found in Clark's purse. Clark acknowledged that appellant had asked her to carry the magazine, and both she and appellant told the inspector that the gun was in the vehicle. Appellant claimed ownership of the gun, which was seized, and they were detained for several hours. When they got back to Los Angeles, appellant tried to find another firearm. After making what seemed to Clark to be "a hundred stops," appellant was able to secure a gun he had previously obtained in Texas and had given to a friend.

At approximately 4:00 a.m. on November 19, appellant and Clark, who were still driving around in the Lumina, drove by appellant's house to check on it because it had been "getting shot up a lot." Appellant told Clark that K-9's parents had lived around the corner from his house, but they had moved because their house was getting shot up.

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[3] Clark acknowledged at trial that she had never before testified that appellant's son had a gun at the time he was shot. In addition, on prior occasions, Clark had merely stated that appellant's response to the people coming to his house was, "Leave me out of it. I don't want to talk about it."

Appellant then drove around the corner to a house on Le Sage Street in which Kenneth Marshall, a member of the In Hood gang, lived. Although appellant told Clark that this individual had nothing to do with the shooting of his son, he began firing shots into the residence. Clark testified that when appellant finished firing, "[h]e said, 'Sometimes you have to kill somebody innocent to bring out who you really want.' Because he couldn't find who he really wanted to --"[4] Clark, who by that time was halfway between the front and back seats, yelled at appellant "like, go or stop or what are you doing." Appellant just laughed, stating, "The funny thing about situations like this is usually it's the woman who gets shot."

Melba Marshall, who was in the house on Le Sage with her husband, her nephew, and her four children, including Kenneth, was awakened by gunshots at approximately 4:45 a.m. She then heard a car drive off. No one was hurt, but the shooting resulted in numerous bullet holes in the house, and the cars parked in the driveway and in front of the house were also hit. One bullet traveled through the house and lodged in the door frame of the back door. A sheriff's deputy recovered bullet fragments from a hallway wall at the rear of the house as well as three expended .45-caliber shell casings from the grounds.

After the shooting, appellant and Clark went to the home of a friend named Dink, and appellant told Dink he had shot at a house. The three drank soda mixed with cough syrup, which made them very sleepy. At that point, Clark and appellant had been awake since their return from Mexico two days earlier. At approximately 9:00 that morning, according to motel records, appellant and Clark checked into a Motel 6 in Inglewood. Appellant signed the registration card under his own name and presented his California driver's license. They changed rooms, ending up in room 928.[5]

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[4] Clark acknowledged that she did not mention this statement during her interview with detectives in January 2001.

[5] Clark acknowledged that in her interview with detectives and in her preliminary hearing testimony, she had stated that she and appellant went directly to the motel after the shooting. The first time she testified that they first went to Dink's house was at the

The next day, appellant and Clark left the motel and drove off. Clark noticed some shell casings in the car, and she and appellant threw them out the window. As they were driving, appellant realized he had left his gun in the motel room. They returned to the motel, and appellant told Clark to go and get the gun. Meanwhile, a housekeeper discovered the weapon in the dresser in room 928 and informed the manager, Brian Green, who summoned police. When Clark went up to the front desk and asked for a key to room 928, Green stated that the motel required identification before he could issue a key. Green had an employee issue a key that would not open the door, in order to stall until the police came.

When two Inglewood police officers arrived, one officer removed the gun, a loaded Glock model 30 .45-caliber semiautomatic, from the drawer in room 928.[6] Another officer spoke with appellant in the motel lobby. Appellant claimed that he was not staying in room 928 but stated that he and Clark had been visiting a friend in that room, and he asked if the person staying in the room was in trouble. The officer said no, but that he needed to talk to the room's occupant. The manager then described the room's occupant to the officer, but when the officer went back to talk to appellant, appellant was gone. Although Green could not identify appellant at trial as the person he saw at the front desk that day, the police officer who spoke with appellant identified appellant as the individual he spoke to in the lobby.

About two weeks later, Clark contacted the Inglewood Police Department, without identifying herself, to try to find out if the police had her name because she had provided her identification at the motel when the gun was recovered. She was concerned that she might get in trouble for something appellant had done. In January 2001, she spoke with

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hearing in September 2002. She also acknowledged that she had previously testified that they checked out of the motel later that same day, rather than the next day as she testified in the current trial.

[6] This gun was the subject of the possession offense of which appellant was found guilty.

detectives in a tape-recorded interview. She explained at trial that she decided to cooperate with the detectives in part because she was angry at appellant after he stopped paying her rent and after he took back the furniture, television and camcorder he previously had given her, and in part because she was scared. She testified that her relationship with appellant began to deteriorate by the end of November, which she attributed to the death of appellant's son, and that she broke up with appellant because when she told him she was worried about getting in trouble after having given her identification, he merely told her to talk to her lawyer, although she did not have one. In the police interview in January 2001, she had stated that she and appellant broke up because appellant was cheating on her.

A search of an apartment in Houston in February 2001 revealed documents in appellant's name as well as in the name of "Mac Johnson," a name by which appellant was known. A manual for a Glock firearm was found in the apartment. The officer conducting the search had seen appellant at the apartment, and had seen him in or near the Chevy Lumina that had been detained at the border checkpoint. That vehicle was registered to a woman who had been appellant's girlfriend, and Texas records listed "Fred Johnson" as having been "tied to that vehicle in the past."

James Carroll, a firearms expert, compared the bullet fragments and shell casings recovered from the scene of the shooting on Le Sage with the Glock firearm found in the motel room. He determined that the casings had been ejected from that gun and from no other firearm. He was able to determine that the bullet fragments had been fired from a Glock gun but, because of the characteristics of the Glock barrel, he could not tell whether they had been fired from that particular weapon, although it was possible that they had. Leslie Douglas McCrary of Texas, a person who sold guns, was the last registered owner of this weapon, as well as of the weapon seized from appellant's car at the Mexican border.

It was stipulated that appellant had been convicted of a felony prior to November 19, 2000.

Clark testified under a grant of use immunity.[7] She explained that when she testified at the preliminary hearing, she had not asked for immunity or requested a lawyer, but during defense counsel's cross-examination, an attorney was provided for her, over the objection of the prosecutor. The attorney advised her not to testify. She then testified at a subsequent proceeding under a grant of immunity.

Clark had been appellant's girlfriend between April and December 2000. Appellant paid for her apartment and they went back and forth between California and Texas. Clark acknowledged a 1996 Texas conviction for felony theft, a pending Texas case with respect to the theft of a $500 pair of shoes, and a pending matter resulting from her arrest in Texas for "battery assault," following a fight involving 17 people. She had asked a detective working on appellant's case to write a letter stating that she had cooperated, but she testified that she did not want the letter because she realized it would not help in the Texas case.

In defense, a woman working at the front desk at the Motel 6 testified that she could not recall seeing appellant at the motel that day, although she observed a similarity that she could not place in a photograph of appellant. She did not recall whether a man or a woman tried to get back into the room in question.

One of the detectives who interviewed Clark testified that during the April 2002 preliminary hearing, defense counsel had questioned him about the four-hour discrepancy between the time of the shooting and the time appellant and Clark checked into the motel. The detective thereafter called Clark and asked if she had gone anywhere after the shooting. That was when Clark told him about drinking soda and cough syrup with Dink. She did not tell him during her January interview about appellant's statement that sometimes innocent people have to die.

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[7] The trial court instructed the jury that it might consider whether Clark's testimony might have been influenced by the promise of immunity given in exchange for it.

DISCUSSION

I. The trial court's failure to instruct on accomplice testimony and the giving of CALJIC No. 2.27 were nonprejudicial.

Appellant contends that the trial court erred in failing to submit to the jury the question of Clark's potential accomplice liability. He argues that she was, or potentially was, an accomplice in the shooting into an inhabited dwelling, and the trial court therefore had a duty to define an accomplice and to instruct that the testimony of an accomplice must be viewed with distrust and must be corroborated. He further contends that the trial court erred in instructing the jury pursuant to CALJIC No. 2.27, because, as an accomplice, Clark's testimony had to be corroborated and CALJIC No. 2.27 informed the jury that her testimony, alone, was sufficient to prove the facts contained therein.[8] Although we reject respondent's assertion that appellant's challenge to CALJIC No. 2.27 has been waived, since the corroboration requirement is a substantial right (*People v. Andrews* (1989) 49 Cal.3d 200, 213), we conclude that these related contentions are unavailing.

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.) "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ibid*.) Whether a person is an accomplice within the meaning of Penal Code section 1111 is a factual question for the jury, "unless there can be no reasonable dispute as to the facts or the inferences to be drawn therefrom," in which case the person is an accomplice as a matter of law. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271, 1272.)

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8 The jury was instructed, in accordance with CALJIC No. 2.27, "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

Neither the fact that counsel had been appointed for Clark nor the fact that she was thereafter given immunity necessarily establishes, as a matter of law, that she was an accomplice. (*People v. Freeman* (1994) 8 Cal.4th 450, 508; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161.) It is possible that counsel was appointed and that Clark was granted immunity because of her potential criminal liability as an accessory, and since an accessory is not "liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given," an accessory is not an accomplice. (*Freeman*, *supra*, at p. 508.)

However, one who aids and abets may be an accomplice. (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220.) "'To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either or committing, or of encouraging or facilitating commission of, the offense." [Citation.]'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

While the evidence was not sufficient to establish that Clark was an accomplice as a matter of law, the evidence that she rode with appellant to the location of the shooting, together with her conduct with respect to the firearms and shell casings before and after the shooting, was certainly sufficient to permit a jury to conclude, by a preponderance of the evidence, that she was an accomplice. The question of whether Clark was an accomplice whose testimony must be corroborated and must be viewed with distrust should therefore have been placed before the jury. (*People v. Hernandez* (2003) 30 Cal.4th 835, 874; *People v. Verlinde*, *supra*, 100 Cal.App.4th at p. 1162.)

"Failure to give accomplice instructions is not prejudicial where there is sufficient corroborating evidence which connects the defendant to the charged offense independently of the witness's testimony. [Citations.] Corroboration may be established entirely by circumstantial evidence. [Citation.] The evidence 'need only be slight' [citation], 'entitled to little consideration when standing alone' [citation], and corroborative of only a portion of the accomplice's testimony. [Citation.]" (*People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1222.) "It is enough that the corroborative evidence

tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth." (*People v. Verlinde*, *supra*, 100 Cal.App.4th at p. 1163.)

Forensic evidence demonstrated that the Glock firearm found in room 928 was the weapon used in the shooting, and independent testimony established that a few hours after the shooting, appellant checked into the motel where the gun was subsequently found in his room. In addition, independent evidence established appellant's possession of and preference for Glock firearms. This evidence was sufficient to connect appellant to the commission of the shooting offense, independently of Clark's testimony. (*People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1222.)

In addition, although the jury was not instructed to view an accomplice's testimony with distrust, the issue of Clark's credibility was placed before the jury both in counsel's arguments and in the instructions. Defense counsel argued that Clark's testimony was not credible, while the prosecutor argued, "Tami Clark is corroborated and backed up by the physical evidence in this case . . . ." The jury was instructed on the determination of the credibility of witnesses and, in particular, it was informed that it could consider the effect of the grant of immunity on Clark's testimony. The failure to give accomplice instructions was nonprejudicial. (See *People v. Mincey* (1992) 2 Cal.4th 408, 461.)

CALJIC No. 2.27, as given, was modified to delete the following bracketed language: "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." While the omitted language should have been included because of Clark's potential status as an accomplice, such error was harmless. The jury was well aware of its duty to weigh Clark's credibility in view of the other instructions given and the arguments of counsel, and there was ample corroboration of Clark's testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1208-1209.)

II. Trial counsel did not provide ineffective assistance.

Appellant contends that trial counsel provided ineffective assistance for failing to request accomplice instructions. This contention must fail.

"To prevail on a claim of ineffective assistance, a defendant must show both that counsel's performance was deficient -- it fell below an objective standard of reasonableness -- and that defendant was thereby prejudiced. [Citation.] Such prejudice exists only if the record shows that but for counsel's defective performance there is a reasonable probability the result of the proceeding would have been different. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 734.) Since we have determined that Clark's testimony was amply corroborated and that the omission of accomplice instructions was nonprejudicial, appellant cannot establish that he was prejudiced by counsel's omission.

III. The evidence was sufficient to support the conviction.

Appellant contends that the evidence does not support his conviction because Clark's accomplice testimony concerning the shooting was uncorroborated, and the only other evidence linking him to the shooting was the gun found in the motel room, which could equally well have been Clark's. He argues that Clark's testimony was not credible, given the number of times she was impeached and because she had ample motive to lie in that she was afraid that she would be charged with the crime or lose her immunity.

"A conviction can be based on an accomplice's testimony only if other evidence tending to connect the defendant with the commission of the offense corroborates that testimony." (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986.) However, the record here establishes ample corroboration.

"'"The evidence required for corroboration of an accomplice 'need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not

necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citations.] Moreover, evidence of corroboration is sufficient if it connects defendant with the crime, although such evidence 'is slight and entitled, when standing by itself, to but little consideration.' [Citations.]"' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 680-681.)

The prosecution introduced independent evidence regarding the shooting and subsequent recovery of bullet fragments and expended casings at the house on Le Sage, evidence of the recovery of the Glock gun from the motel room which appellant had signed for, and appellant's return to the motel to recover the gun, together with testimony establishing that the expended cartridges recovered at the scene had been fired from that gun. (See *People v. Gurule* (2002) 28 Cal.4th 557, 628 [forensic evidence corroborated accomplice's description of crime].) In addition, there was independent testimony that a Glock firearms manual was found in appellant's Texas apartment and that another Glock weapon had been found in the car in which he was traveling in Mexico. This evidence amply corroborated Clark's testimony and supported the determination of guilt.

Appellant's assertion that Clark was not to be believed is merely a request that this court reweigh the evidence. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) "The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.) In particular, the evaluation of a witness's credibility is exclusively the function of the trier of fact. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Viewed in accordance with the appropriate standard, substantial evidence supports appellant's convictions.

IV. The admission of testimony that a second firearms examiner did not disagree with the first examiner's opinion does not require reversal.

James Carroll, the forensic firearms examiner, testified that the shell casings recovered from the shooting scene had been fired from the Glock gun found in appellant's motel room and that the bullet fragments had been fired from a Glock firearm and might have been fired from that particular weapon. After Carroll testified that he had prepared a report documenting his opinion, the prosecutor began to ask whether there had been a prior quality assurance procedure. Defense counsel objected that if the witness was going to testify that someone else had checked his results, that testimony would constitute hearsay. The prosecutor responded that Carroll was an expert who could rely on hearsay and "if it has to be rechecked by another person in the lab, I think that goes towards his opinion." The trial court overruled defense counsel's objection.

The prosecutor then asked Carroll whether it was the policy and procedure of his laboratory to have someone else check the evidence before he could make his report. Carroll testified that any time a firearms examiner reaches a conclusion, the evidence has to be independently examined by another firearms examiner, and if this examiner arrives at a different opinion, the differences have to be resolved before a report is issued. He testified that in this case this procedure was used and the secondary examination was performed by George Stanley, who is now the head of the State of Georgia Firearms Examination Unit for the Georgia Bureau of Investigation. There were no differences in opinion between Carroll and Stanley.

Appellant contends that this testimony constituted hearsay and its admission denied him his right to confront witnesses in violation of the Sixth Amendment, as set forth in *Crawford v. Washington* (2004) __ U.S. __ [124 S.Ct. 1354].[9] He argues that the

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[9] In *Crawford*, the United States Supreme Court held that the admission of hearsay that is testimonial in nature constitutes a violation of the Sixth Amendment right of confrontation where the declarant is unavailable to testify at trial and the defendant had no prior opportunity to cross-examine the declarant. (*Crawford v. Washington*, *supra*, 124 S.Ct. at p. 1374.)

erroneous admission of the hearsay was prejudicial because it tended to corroborate the testimony of Clark or to render her testimony more believable.

In the absence of any objection in the trial court on the ground that appellant was denied the right of confrontation, this claim is waived. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.)[10] Even were we to find that the testimony constituted hearsay, in that it was admitted for the truth of the matter asserted, that it was erroneously admitted, and that the hearsay statement was testimonial, so that appellant's right of confrontation was thereby violated, the admission of the testimony would be harmless beyond a reasonable doubt under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390, 1394.)

The brief testimony that Stanley concurred in Carroll's opinion merely corroborated, and was cumulative to, that of Carroll. Carroll testified at length as to his training and experience and as to the foundations for his opinion, including an explanation of the types of markings left on a cartridge case that enabled him to determine that the case had been ejected by a particular firearm. Defense counsel cross-examined Carroll vigorously as to the foundation for his opinion, but was only able to elicit testimony that Carroll could have, but did not, present photographs to the jury to demonstrate the markings that matched, and that he could not state how many markings he was able to match in terms of quantity or quality. It is not reasonably possible that a different result in this trial would have occurred had defense counsel been able to cross-examine Stanley as to his expert opinion or had the testimony regarding Stanley's concurrence been excluded. Stated another way, the verdict reached by the jury was

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10 We disagree with appellant's assertion that a hearsay objection is based both on state law and the federal Constitution and thus necessarily includes a confrontation clause issue. (*People v. Alvarez*, *supra*, at p. 186; see *Crawford v. Washington*, *supra*, 124 S.Ct. at p. 1374 ["Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does [*Ohio v.*] *Roberts* [(1980) 448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."].)

surely unattributable to the testimony that Stanley concurred in Carroll's opinion. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

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We concur:

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ASHMANN-GERST